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## Marijuana Ballot Measures Score High in Midterms

Last month, Michigan voters approved a ballot measure legalizing cannabis as medical marijuana initiatives were passed in both Missouri and Utah. With the election of a number of pro-legalization governors and the shift of power in Congress, the momentum for decriminalizing and legalizing both the recreational and medical use of marijuana seems to be building. Employers should review their existing drug and other employment policies in light of these developments.

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### Background

In 1996, California became the first state to approve the use of medical marijuana, with the passage of Proposition 215. Prior to last month's midterm elections, 30 other states had legalized medical marijuana. In 2012, Colorado and Washington became the first states to legalize recreational marijuana, passing Amendment 64 and Initiative 502, respectively. By the midterms, seven other states — California, Massachusetts, Maine, Nevada, Oregon, Alaska, and Vermont — and Washington, D.C. had legalized the recreational use of marijuana. Still other states had decriminalized low-level possession offenses.

### Ballot Initiatives

More U.S. voters weighed in on marijuana issues in 2018 than ever before. While both medical and recreational marijuana remain illegal under federal law, attitudes about legalization continue to shift. When Americans went to the polls on November 6, support for legalizing marijuana use had never been higher — 66 percent according to [Gallup](#) — including a majority of Americans aged 55 and older.

Last month, voters in four states had the final say on whether to legalize marijuana for medical or recreational use in their communities. Two states — Michigan and North Dakota — put the issue of legalizing recreational use to voters, while two other states — Missouri and Utah — asked voters to decide whether to allow marijuana for medical use.

## Michigan

Voters made Michigan the tenth state — and the first in the Midwest — to legalize recreational marijuana. Michigan Proposal 1, the Marijuana Legalization Initiative on the ballot as an indirect initiated state statute, passed with nearly 56 percent of the vote.

Notably, the Michigan Regulation and Taxation of Marihuana Act provides some protections for employers that have workplace drug policies in place. It “does not require an employer to permit or accommodate conduct otherwise allowed by this act in any workplace or on the employer's property.” Importantly, the act “does not prevent an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's violation of a workplace drug policy or because that person was working while under the influence of marihuana.”

**Buck comment.** Whether voters or legislators in other Midwest states will follow Michigan's lead remains to be seen. Notably, Illinois Governor-elect J.B. Pritzker has indicated that he favors legalizing marijuana for recreational use. Wisconsin Governor-elect Tony Evers has signaled that he would support and sign medical marijuana legislation but would let the voters decide the issue of full legalization.

## Missouri

Voters in Missouri considered three constitutional amendments on legalizing medical marijuana. Amendment 2, the Medical Marijuana and Veteran Healthcare Services Initiative, called for legalization with a 4 percent tax. It passed by a margin of 66 percent to 34 percent, defeating two other measures that would have legalized marijuana for medical purposes with either a two percent or 15 percent tax.

Amendment 2 will allow qualified patients with their doctor's approval to receive state identification cards that allow them to consume marijuana. The measure provides some protection for employers by prohibiting claims against any employer, former employer, or prospective employer for wrongful discharge, discrimination or similar causes of action or remedies based on the employer's prohibition against being under the influence of marijuana or attempting to work while under the influence.

## North Dakota

In 2016, voters in North Dakota approved the use of marijuana for medical purposes in the state, but this year rejected a measure to legalize recreational use. North Dakota Measure 3, the Marijuana Legalization and Automatic Expungement Initiative, would have removed hashish, marijuana, and tetrahydrocannabinol (THC) from the list of Schedule I controlled substances in the state and prohibited prosecution for non-violent marijuana-related activity other than distribution to, or possession by, a minor. The measure was defeated by a margin of roughly 59.5 percent to 40.5 percent.

## Utah

Utah voters passed Proposition 2, the Utah Medical Cannabis Act, with roughly 53 percent of the vote. The Act would allow individuals with certain illnesses to acquire and use physician-recommended cannabis.

For these purposes, qualifying illnesses include: HIV, AIDs, or other autoimmune disorder; Alzheimer's disease; amyotrophic lateral sclerosis (ALS); cancer; cachexia or other wasting disease characterized by physical wasting such as weight and muscle loss; a condition manifest by nausea or malnutrition associated with chronic disease; Crohn's disease, ulcerative colitis, or other gastrointestinal disorder; epilepsy or other disorder causing seizures; multiple sclerosis or other condition causing muscle spasms; post-traumatic stress disorder (PTSD); autism; any rare condition or disease affecting less than 200,000 individuals in the U.S. as defined in Section 526 of the federal Food, Drug, and Cosmetic Act; and chronic or debilitating pain if a physician determines that the individual is medically unable to use opiate-based pain medication or is at risk of becoming dependent on or overdosing on it. Individuals who suffer from other conditions may seek approval from a five-physician Compassionate Use Board on a case-by-case basis.

Under Proposition 2, it is unlawful for medical marijuana cardholders to smoke or use a device to facilitate smoking marijuana and prohibits them from using medical marijuana or a marijuana product in public except in the event of a medical emergency. Notably, while the measure prohibited landlords from discriminating against approved users, it did not address workplace issues.

During a special session on December 3, the Utah State Legislature voted to override Proposition 2, passing the Utah Medical Cannabis Act to replace the voter-approved medical marijuana ballot initiative. The Act, which was immediately signed into law by Governor Gary Herbert, creates a state-run medical cannabis program, reduces the number of privately run dispensaries, and includes other changes such as in patient use, qualified medical providers, qualifying conditions, licensing, and regulation. Supporters of Proposition 2 have already filed a legal challenge.

## In closing

While still a federally controlled substance, marijuana is now legal for medical use in 33 states and the District of Columbia and for recreational use in 10 states. Employers should review their current drug, nondiscrimination and other employment policies in light of the shifting legal landscape.

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